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In The

Supreme Court of the United States

October Term, 1997

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

v.

EUGENE WOODARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I

Whether due process protections apply at all to Ohio's unique, mandatory capital clemency procedure that governs the parole board's investigation and recommendation process, which must be completed before the Governor may grant or deny clemency.

II

Could any set of facts consistent with Woodard's complaint establish that Ohio's Death Penalty Clemency Procedure imposes an unconstitutional condition on his Fifth and Fourteenth Amendment right against self-incrimination.

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STATEMENT OF THE CASE

1. Facts

Counsel for twenty-three year old death row inmate Eugene Woodard was informed on September 6, 1994 that three days later, Mr. Woodard could make a plea for his life in a clemency interview. Mr. Woodard had not applied for clemency. At the interview, Mr. Woodard would not be permitted to have counsel with him. The interview might, at Petitioners' discretion, be Mr. Woodard's only chance to ask for clemency for two years. His statement could be used against him if he won a re-trial or new sentencing. Counsel was also informed that a clemency hearing for Mr. Woodard would be held on September 16, 1997 but that neither he nor Mr. Woodard could be present. [J.A. p. 4]

The following day Mr. Woodard's counsel sent a letter to the Ohio Adult Parole Authority (APA), informing it that Mr. Woodard had been granted a stay of execution in order to pursue state post-conviction remedies, objecting to the proceedings on a number of grounds, and asking that both the interview and hearing be continued. [J.A. pp. 4-5] Counsel received no response. As a result this action was filed. [J.A. p. 5]

2. Ohio Clemency Law

Mr. Woodard's execution date was set at the conclusion of his state appellate proceedings. Two days later, on July 21, 1994, Ohio's new Death Penalty Clemency Procedure went into effect. [J.A. pp. 8-14] The Death Penalty

Clemency Procedure was adopted by the Ohio Department of Rehabilitation and Correction, pursuant to a legislative delegation of authority under Ohio Rev. Code Ann. § 5120.01.[1] The new procedure regulates the processes to be followed by the Ohio Adult Parole Authority ("APA") when conducting clemency hearings for death row inmates.[2]

In Ohio, clemency review is a two stage process: the application stage and the executive decision making stage. Ohio's two part clemency process was recently explained by the Ohio Supreme Court in *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 524-525, 644 N.E.2d 369, 378 (1994):

> The exercise of the pardoning power involves two distinct elements – the application process and the consideration process. The phrase [in Ohio Const. art. III, § 11] 'manner of applying for pardons' includes the entire application process, which encompasses the filing of the application itself, the investigation, the recommendation, and the full report compiled by the APA.

[1] The Department of Rehabilitation and Correction is a department of the executive branch. The director's position is a cabinet level appointment. Ohio Const. art. III, § 21; Ohio Rev. Code Ann. §§ 121.02(O), 121.03(Q).

[2] While not a matter for this Court's determination, there is a question as to whether this policy was legally enacted. In the only challenge to the policy litigated in the Ohio Courts, the Tenth District Court of Appeals affirmed the dismissal of a declaratory judgment action on procedural grounds. The court went on to say, however, that had the question been properly presented, it would have found the policy unconstitutional, as applied, under the pre-1996 amendment to Article III, section 11 of the Ohio Constitution. *Coleman v. Ohio Adult Parole Authority*, 1996 WL 566010 (Ohio App. 10th Dist. 1996).

> We find that the General Assembly's authority to regulate the application process extends to the time just before the Governor reaches a substantive decision concerning pardon. Once this point is reached, the General Assembly's constitutionally granted authority to regulate procedurally the pardoning power of the Governor is at an end.

Once the written application is filed, the APA conducts an investigation, makes a recommendation, and reports both to the Governor. The investigation includes an interview with the inmate (if the inmate requests one), a hearing with input from the prosecuting attorney, the trial judge, and the victim's representative, and a review of the inmate's prison file. Ohio Rev. Code Ann. § 2967.07.[3] After the report and clemency recommendation are forwarded to the Governor, the APA has no further role in the process. The Governor of Ohio then decides whether to grant or deny clemency.

The Death Penalty Clemency Procedure establishes a mandatory clemency review that commences when the Ohio Supreme Court completes direct appellate review of a capital case. The investigation begins immediately.

[3] The portions of this statute relating to commutations and reprieves were held unconstitutional under Ohio Const. art. III, § 11. *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 644 N.E.2d 369. Section 11 was amended, effective January 1, 1996, to allow legislative regulation of the manner of applying for commutations. Ohio Rev. Code Ann. § 2967.07 has not been reenacted since the constitutional amendment became effective. The references to commutations and reprieves held unconstitutional in *Maurer* still appear in the text of the statute.

Once the court sets an execution date, a clemency "hearing" is held unless a stay is granted 45 or more days before the execution date. This is true regardless of the inmate's wishes. Once a hearing has been scheduled under the Death Penalty Clemency Procedure it cannot be stopped.

When the hearing is scheduled, the prisoner is notified of the hearing and his opportunity to be interviewed by APA parole board members. He is also asked to submit to psychiatric or psychological evaluation.

At the hearing the inmate will not be present. The parole board members who interviewed him will present the information he provided in the interview. Attendance at the hearing, by counsel or anyone other than parole board members, is at the discretion of the parole board chair. A decision on whether to recommend clemency will be made the day of the hearing if possible and the governor informed of that decision. A written report including the results of the investigation and the recommendation will be provided to the governor within 5 days. At that time the inmate, his lawyer, the attorney general, the prosecutor, and the victim's representative will be informed of the recommendation. A press release will be issued informing the media of the APA's recommendation. If there is not enough time to follow this procedure it will be suspended. Thereafter, if new information becomes available, it is within the APA's discretion to supplement its initial decision, hold a new hearing, and inform the governor. Death Penalty Clemency Procedure § VI(A-G), J.A. pp. 9-14.

The Death Penalty Clemency Procedure works in conjunction with Ohio Administrative Code § 5120:1-1-15 and Ohio Rev. Code Ann. §§ 2967.03, .07, and .12.[4] Ohio Rev. Code Ann. § 2967.03 provides that clemency can be recommended only on a finding that "there is reasonable ground to believe that granting [clemency] would further the interests of justice and be consistent with the welfare and security of society." The statute also provides that the APA may not recommend clemency unless it has complied with statutory notice requirements and considered any statements offered by the victim's family or representative. Section 2967.07 of the Ohio Revised Code requires, when a clemency application is filed, that the APA conduct "a thorough investigation into the propriety of granting [clemency]." The APA shall report its findings to the governor in writing. The report shall include a statement of "the facts in the case," the APA recommendation "for or against" granting clemency, "the grounds therefore" and the "records or minutes relating to the case." Ohio Rev. Code Ann. § 2967.12 requires that prior to recommending a pardon or commutation the prosecuting attorney, trial judge, and victim's family be notified. If a representative for the victim provides a written statement

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[4] Ohio Admin. Code § 5120:1-1-15(G) says that the APA clemency recommendation is "within its sole discretion and shall not be subject to administrative review." The Ohio Supreme Court has held that administrative rules cannot supersede statutory requirements. *Williams v. Morris*, 62 Ohio St. 3d 463, 468, 584 N.E.2d 671, 675 (1992). The APA discretion insulated from administrative review by Ohio Admin. Code § 5120:1-1-15 must therefore be exercised under the standards of Ohio Rev. Code Ann. §§ 2967.03, .07, and .12.

to the APA before the clemency recommendation has been made, the victim's statement must be considered.

Ohio Administrative Code § 5120:1-1-15(H) states that if clemency has been denied within two years prior to the APA receiving an application, "the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial. In such case, no hearing and no further investigation shall be necessary unless specifically requested by the governor."

SUMMARY OF ARGUMENT

The due process issue before this Court is a narrow one: whether any due process protections apply to Ohio's unique, legislatively created death penalty clemency application procedures. Executive branch clemency decision making authority and discretion are not at issue.

Life and liberty interests recognized by both federal and state law require that due process protections should be applicable to Ohio's clemency application procedure in some manner. Mr. Woodard has an independent federally protected life interest that remains intact and requires due process protection until execution takes place. While the sentence of death may have diminished Mr. Woodard's right not to be executed by the state for the crime he was convicted of committing, it did not eliminate it. Mr. Woodard, like every capital litigant, has sufficient life interest to invoke the jurisdiction of the courts. He is not legally dead.

The Sixth Circuit found that due process safeguards might be required in Ohio's clemency application process due to the "role of clemency in the entire punitive scheme." *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1186 (6th Cir. 1997). Because of the interaction between the possibility of clemency being granted and all of the judicial proceedings that go before it, clemency is an " 'integral' and inextricable part of the proceedings for determining whether a defendant should be deprived of his life, liberty, or property." *Id., quoting United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996). Clemency is part of the system that protects Mr. Woodard's original, pre-trial life and liberty interests in not being executed by the state.

Mr. Woodard also has life and liberty interests in the state-created right to seek clemency review. Ohio has recognized the opportunity to seek clemency as a right. This state-created right is entitled to due process protection.

The life and liberty interests at issue in Ohio's capital clemency process require some modicum of due process protection. Ohio has chosen to follow a two stage process for resolving clemency decisions in capital cases. The clemency investigation and recommendation that is central to that process implicates the core interests identified in this Court's due process jurisprudence and are no part of the discretionary executive clemency decision. This Court's due process jurisprudence requires that the Sixth Circuit's decision be affirmed.

Finally, because it would violate Mr. Woodard's Fifth Amendment rights to subject him to an uncounseled

interview as a condition of participating in the clemency process, this Court should order the court below, on remand, to consider the effect of Ohio's Death Penalty Clemency Procedure on Mr. Woodard's Fifth Amendment rights.

ARGUMENT

I. AT LEAST MINIMAL DUE PROCESS PROTECTIONS APPLY TO OHIO'S UNIQUE DEATH PENALTY CLEMENCY PROCEDURE

A. This Case Presents a Narrow Question Arising From an Unusual Factual Situation. The Court Should Decline the State's Invitation to Make an Unnecessarily Broad Ruling

The question before this Court is whether Ohio's legislatively created clemency procedures must meet at least minimal due process standards. This case does not arise, as Petitioners claim, "from a challenge to the Ohio Governor's clemency power." [Pet. Br. p. 2] Executive branch decision making authority and discretion are not at issue in this matter. Nor does this case raise the question of whether due process is applicable to every state's clemency process but rather focuses on Ohio's unique clemency procedure. Neither does it ask this Court to determine what process is due.

Recognizing that due process protections may apply in some manner to some clemency proceedings will not create the deluge of litigation predicted by Petitioners. This is so because many states already provide procedural

protections in their clemency processes[5] and because the question presented here revolves on Ohio's unique clemency structure. Petitioners raise the specter that a recognition that due process protections may apply to Ohio's clemency application process in some manner will result in an "eyestraining grant of judicial authority to review all manner of State practices." [Pet. Br. p. 21] There may, of course, be a trickle of cases in other states testing the parameters of such a recognition but it will not be the flood Petitioners predict. No other states have mandatory clemency application practices that overtly deny death sentenced inmates the rudimentary protections that Eugene Woodard has alleged he is denied.[6]

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[5] The majority of the thirty-eight states with the death penalty have some regularized clemency processes which must be followed when clemency is sought. Six states have given the decision making power exclusively to a board. [Table 1, App. p. A-10] Eighteen states use a combination of a board and executive decision maker. [Table 2, App. p. A-10] In nine of those eighteen states, the governor must have a recommendation in order to grant clemency [Table 3, App. p. A-12]; the other nine states require the governor to receive a non-binding recommendation from the board. [Table 4, App. p. A-12] Fourteen states give the governor the sole responsibility for considering clemency applications, although the governor may direct a board to investigate the application. [Table 5, App. p. A-13] In three states the governor sits on the clemency board. [Table 6, App. p. A-14]

[6] The large majority of death penalty states provide procedural protections – such as notice and an opportunity to be heard – that have been long recognized to be the hallmarks of due process. Thirty-five of the thirty-eight states allow a hearing of some sort to review the inmate's evidence. [Table 7, App. p. A-15] Sixteen death penalty states provide for public hearings to review clemency requests. [Table 8, App. p. A-17] Witnesses for both sides may present written or oral statements in thirty-four of the thirty-eight death penalty states. [Table 9, App. p. A-18] In thirty-two states, if

Petitioners' concern that there will be a rush to set due process limits in discretionary appeals and other post-conviction proceedings is misplaced. The law is well settled with regard to such proceedings. *Ross v. Moffitt*, 417 U.S. 600 (1974) (discretionary appeals); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (state post-conviction proceedings). The impetus to test further will come, as it does now, from the circumstances of individual cases – not from the ruling in this matter.

In any case, this Court has found the existence of due process rights over objections based on the "slippery slope." *See, for example, Goss v. Lopez*, 419 U.S. 565, 574 (1975). The amount of litigation potentially engendered by any ruling of this Court has never been determinative of the extent of constitutional protections.

By contrast, holding that due process can never apply to any aspect of clemency proceedings will result in an arbitrary and unreliable clemency system. If no due process protections apply, the door is open to abuses ranging from withholding clemency recommendations in order to wait for the next Governor who might be more inclined to accept the APA's recommendation,[7] to APA decisions to

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the inmate is represented by counsel, that counsel is permitted to be involved in the clemency process. [Table 10, App. p. A-20] Three states specifically provide for the appointment of counsel for a clemency review. [Table 11, App. p. A-22] In only one state, Arizona, is there any arguably mandatory clemency review. There the Board of Pardons has a duty to review every capital case to determine whether a reprieve is warranted. Ariz. Ad. Code R. 5-4-603

[7] This scenario is not far fetched. A similar fact pattern involving judicial appointments underlies the decision in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803).

"slow track" or deny applications from women or minority applicants. It would leave bureaucratic error or misconduct a barrier to a clemency applicant's efforts to reach the Governor should APA employees fail to process the application.[8]

This Court should reject Petitioners' invitation to rule broadly on the right to due process in executive clemency proceedings. The limited scope of the due process issue that is before this Court is apparent from the Sixth Circuit's opinion. The Sixth Circuit "decline(d) to address [Mr. Woodard's] specific due process arguments," deciding only that the District Court had erred in holding that "the Fourteenth Amendment was completely inapplicable to the State's clemency proceedings" on the limited record arising from a motion to dismiss. *Woodard*, 107 F.3d at 1188. Instead, because the Sixth Circuit found that

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[8] *Compare Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, an employee fired due to a physical handicap filed a timely charge with the Illinois Fair Employment Practices Commission, which in turn failed to schedule a timely hearing under the state law. The state court barred the claim even though it was the state commission that erred. This Court reversed, finding that the state's statute created a protected property interest in the handicap-discrimination claim and that dismissing the claim violated federal due process: "[A]ny other conclusion would allow the State to destroy at will virtually any state-created property interest." *Id.*, 455 U.S. at 432. The Court reached this conclusion notwithstanding the fact the state's negligence gave Logan a cause of action against the state in its Court of Claims. "Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole. . . ." *Id.*, 455 U.S. at 436-437. There is little opportunity for redress of an unprocessed clemency application.

it could "imagine extreme situations in which federal due process would be offended," *id.*, and because the facts before the court were insufficient to determine whether such an extreme situation exists in this case, the court remanded.

As this Court has noted in other circumstances, when a state "statute has unique structure and language . . . whether any other state statute provides a protectable entitlement *must* be decided on a case-by-case basis." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), *quoting Greenholtz v. Nebraska*, 442 U.S. 1, 12 (1979) (emphasis added).[9] No other state clemency system precludes or limits review for two or more years after subjecting a death row prisoner to a mandatory clemency process.

This case focuses on a novel, mandatory clemency process within Ohio's unique legislative, administrative, and constitutional structure. The clemency process at issue applies to capital cases only, proceeds regardless of the inmate's wishes, and is used in no other state. Under these circumstances, the Sixth Circuit would have had the district court make a "case-by-case" determination as to whether facts are present that require at least minimal due process protection.

In order to invoke the protection of the Due Protection Clause, one must show state action that infringes

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[9] *See also Ford v. Wainwright*, 477 U.S. 399, 425 (1986) ("Due process is a flexible concept, requiring only 'such procedural protections as the particular situation demands.' ") (O'Connor, J., concurring).

upon a constitutionally protected right to life, liberty, or property. Respondent demonstrates in the following pages the substantial interests at risk in a denial of clemency review. First there is a federally based life interest separate from the life interest at risk in trial. Second, federal life and liberty interests are protected from start to finish of the criminal justice system. Third, Ohio has created a liberty interest in the right to seek clemency. Fourth, there is a state-based life interest at risk when the right to seek clemency is denied or infringed. Each of these interests compels affirmance of the Sixth Circuit's holding and a remand for fact finding.

B. Life and Liberty Interests Arising Under the Federal Constitution are Implicated by Ohio's Death Penalty Clemency Procedure.

1. Mr. Woodard has a Life Interest Protected by the Fourteenth Amendment.

Eugene Woodard has a life interest independent from and broader in scope than the life interest diminished by his death sentence. That independent life interest is protected by the Fourteenth Amendment to the United States Constitution. Mr. Woodard's independent life interest remains intact and requires due process protection until execution takes place. While the sentence of death may have diminished Mr. Woodard's right not to be executed by the state for the crime he was convicted of committing, it did not eliminate his life interest.

Mr. Woodard, like every capital litigant, has sufficient life interest to invoke the jurisdiction of the courts. He is not legally dead. Were he killed by an inmate or

even a state employee such as a prison guard, his own killer would be prosecuted for the wrongful taking of a life despite the fact that it was the state's ward or the state's employee who killed him. Were his execution carried out without complying with the many post-trial state procedures designed to insure its reliability, his executioner would be guilty of homicide. *See Knapp v. Thomas*, 39 Ohio St. 377, 382 (1883) (Sheriff who executes on basis of conviction when presented with a warrant of pardon he believes to be invalid would be guilty of homicide). Mr. Woodard's life interest is protected by the Eighth Amendment guarantee against cruel and unusual punishment until the moment of his death. A death sentence is not the equivalent of an execution. As long as Eugene Woodard's heart pumps and his lungs breathe he has a protectable life interest.

This Court has recognized that the word "life" in the due process clause has meaning separate and apart from the word "liberty." In *Spaziano v. Florida*, 468 U.S. 447, 468 (1984), three Justices of this Court (concurring and dissenting in part) found that "[b]ecause a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State's deprivation of a person's life is also qualitatively different from any lesser intrusion on liberty."[10] This

[10] Justice Stevens also wrote that "In the 12 years since *Furman v. Georgia*, 408 U.S. 238 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano*, 468 U.S. at 468.

Court's consistent view that "death is different" has shaped both its due process and its Eighth Amendment jurisprudence in capital cases, and has resulted in a host of procedural protections designed to ensure heightened reliability in the imposition of the punishment. *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Gardner v. Florida*, 430 U.S. 349 (1977); *Beck v. Alabama*, 477 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Ford v. Wainwright, 477 U.S. 399 (1986) demonstrates that the life interest continues beyond conviction and sentencing. *Ford* asked whether Florida could lawfully execute a person who became insane after trial. The Court held that such an execution could not occur. Due process protections were central to the result. Because the Eighth Amendment applies to the states by way of the due process clause of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring), the execution of an insane inmate would work a deprivation of life without due process of law. Additionally, *Ford* held that Florida's procedures for determining a prisoner's sanity violated procedural due process by not allowing an opportunity to be heard. *Ford*, 477 U.S. at 413-416 (plurality opinion); 424 (Powell, J., concurring); 427-429 (O'Connor, J., concurring in part, dissenting in part). Thus, the purely executive function of carrying out a death sentence after a lawful conviction is

constrained by procedural due process. *Ford* could not have found such constraints in the Fourteenth Amendment if the inmate did not retain a life interest after conviction and sentencing.

Petitioners' reliance on *Dumschat*, 432 U.S. 458, is entirely misplaced. All that *Dumschat* is about – and the only constitutional issue it addressed – is the definition of the "liberty" that is protected by the Fourteenth Amendment. But the text of the Fourteenth Amendment says in plain language that a person's "life" is subject to due process protections whether or not he also has a liberty interest against the state action that kills him. "Life," unlike "liberty" (once liberty is taken to mean more than freedom from confinement), is not a legal construct but a biological fact. Other obvious distinctions aside,[11] the *Dumschat* case is simply inapplicable to a situation in which life is at stake.

The Sixth Circuit noted that in order to demonstrate a protected life interest beyond the life interest protected by "his trial, appeal, habeas petitions, and even his clemency application," Mr. Woodard would have to demonstrate "a separate, life-affecting change in his situation." *Woodard*, 107 F.3d at 1184. In addition to failing to protect Mr. Woodard's "original" life interest [discussed in

[11] *Dumschat* is inapplicable to this matter for many other reasons discussed throughout this brief including the fact that this Court found that Dumshat had not been denied his right to seek clemency. *Dumschat*, 452 U.S. at 467. *Dumschat* focused on the conclusion of clemency review and sought an explanation for the decision while this case focuses on the application procedure that allows clemency review to take place.

section I(B)(2) below], denial of the right to seek clemency is a life-affecting change in Mr. Woodard's situation.

Clemency review is a step in the criminal justice process that protects the reliability of sentences to be sure, but it also protects the broader life interest with which every person is born. It does so in a distinct way that no other step of the criminal justice system process can. Clemency review allows a decision that judges the person/life as a whole. Only in clemency review can rehabilitation be fully considered.[12] Only in clemency review can subsequent acts of courage or self-sacrifice be weighed against the crime for which the applicant was convicted.[13] Only in clemency review, can mercy be shown for those whose mental disabilities, although insufficient to avert legal culpability,[14] so disadvantage them that execution for the crimes that their impaired judgment led them to commit is unfair.[15] Only in

[12] Governor John Brough, 1864, Executive Documents, Part 1, p. 58, *Governor's Message* "The pardoning power has a two-fold object: the one to afford a remedy for any injustice that, from the nature of the testimony, or other circumstances, may have been committed in the conviction; the other to encourage repentance and reformation." *And see generally*, MICHAEL V. DISALLE, THE POWER OF LIFE OR DEATH (1965)

[13] *See* Governor John Bricker, Vol. 121, Ohio Senate Journal Index, p. 1233 (1945), Commutation of Hance Hamilton for "special services rendered to the State at the time of an attempted prison break."

[14] Ohio recognizes only the most stringent definition of insanity. Ohio Rev. Code Ann. §§ 2901.01(A)(14), 2945.391. Unlike some other states, Ohio continues to allow the execution of the mentally retarded.

[15] *See* DISALLE, *supra* note 12, at 64: "Surely society did not need to take the life of a mentally defective individual . . . who

clemency review is the qualitative and quantitative difference between death and every other penalty weighed against the death row inmate's entire life interest. Infringing the right to seek clemency is "a separate life-affecting" change in Mr. Woodard's pre-execution circumstances.

Mr. Woodard's life interest was not extinguished when the death sentence was pronounced. It continues as long as he lives and is protected by the state throughout that time. While a death sentence diminishes the condemned person's life interest in that the state may, in payment for his crime, lawfully take his life on the date and time assigned and in the manner prescribed by law, the condemned person has a life interest in every intervening process that leads to his execution or terminates the state's right to carry it out.

2. Mr. Woodard Has a Protectable Interest In Seeking Clemency that Arises from Clemency's Integral Role in Ohio's Criminal Justice System.

a. Mr. Woodard's Original Pre-trial Life and Liberty Interests are Protected at all Stages of the Criminal Justice Process Including Clemency

The Sixth Circuit correctly found that clemency review is an integral part of Ohio's criminal justice system and that, as such, Mr. Woodard's original pre-trial

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should not have been allowed outside an institution." Reported at Governor Michael V. DiSalle, Communtation of Lewis Bishop Niday, Vol. 129, Ohio Senate Journal Index, p. 1747 (1959).

life and liberty interests are protected by it. Those original rights trigger due process protections at the beginning of the criminal justice system and continue to require due process protection until all processes within the system that are designed to insure reliability of convictions and sentences are complete. Ohio's criminal justice system ends with clemency review. Analogizing to this Court's ruling in *Evitts v. Lucey*, 469 U.S. 387 (1985), the Sixth Circuit found that some level of Due Process protection is required throughout the various stages of the criminal justice system but determined that "the degree to which each component forms an 'integral part' of the overall adjudicative[16] system determines the degree to which due process plays a role." *Woodard*, 107 F.3d at 1186.

Clemency review and the right to seek it are an integral part of Ohio's overall criminal justice system. The clemency power given to the Ohio Governor is one aspect of this system. The Ohio Supreme Court recognized in *Knapp v. Thomas*, 39 Ohio St. 377, 391-392, while discussing the need for the courts to refrain from interfering once the governor has issued a pardon, that the clemency power is an aspect of the separation of powers under the Ohio Constitution.[17] Executive clemency

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[16] The word "adjudicative" is here used in the broad and primary sense. To "adjudge" means "to decide or determine by law." WEBSTER'S DELUXE UNABRIDGED DICTIONARY (2d ed. 1979). It should not be read as a reference to a determination by the judiciary. The Sixth Circuit made clear that it referred to "proceedings made available by the government." *Woodard*, 107 F.3d at 1186.

[17] The U.S. President's clemency authority serves the same function. The Framers considered this during the 1787

review is the final step in Ohio's criminal justice system. The right to seek clemency is an aspect of the constitutional structure of Ohio government.[18]

The fact that the opportunity to ask for executive clemency is a right conferred by the constitutional structure of the government is so commonly understood in Ohio that it has always been accepted by the people, governors, and courts of the state. The consistent and unquestioning acceptance of the right to seek clemency is evidence of its indispensable and inextricable role in Ohio's criminal justice system. The Ohio Supreme Court recognized many years ago that seeking executive clemency is a right and perhaps the only remedy available to Ohio prisoners in some circumstances. The Ohio Supreme Court said in *In re Kline*, 70 Ohio St. 25, 29, 70 N.E. 511, 512 (1906), that a prisoner convicted under a law subsequently repealed had no redress available in the courts of

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Constitutional Convention. In determining the extent of the President's pardoning power a motion was made to exclude cases of treason and allow that aspect of clemency to be controlled by the Congress. The motion was defeated after discussion which noted that it would be inconsistent with the separation of powers to allow the legislative branch to take over that function. United States Constitution Convention (1787), *The Records of the Federal Convention of 1787*, Vol. II, pp. 626-627 (Max Farrand ed., Yale University Press) (1911).

[18] This Court has reached the same conclusion about the role of clemency in the federal system. *See Biddle v. Perovich*, 274 U.S. 480, 486 (1927) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

the state but, "The prisoner still has the right to appeal to executive clemency for a pardon." Ohioans sought clemency and Ohio governors granted and denied it before any legislation was enacted to regulate the application procedure.[19] Ohio courts have recognized consistently that the governor's clemency power exists independently of any legislation. *Knapp v. Thomas*, 39 Ohio St. at 392; *State v. Morris*, 55 Ohio St. 2d 101, 111, 378 N.E.2d 708, 714 (1978); *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d at 518, 644 N.E.2d at 378. Recourse to that power is the right of those facing execution in Ohio.

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[19] Pardon Records of Governor Rueben Woods 1851-1852. (On file with the Ohio Historical Society, State Archives); 1855 Executive Documents, Part I, Public Document No. 6, p. 58, Commutation of John Howley (Governor William Medill); 1863 Executive Documents, Part 1, Pardon Report p. 31, Commutation of Washington King (Governor David Tod); 1865 Executive Documents, Part 1, Report of Pardons and Reprieves, p. 264, Reprieve of Henry Ducolon (Governor Charles Anderson); 1866 Executive Documents, Part 1, Pardon Report, p. 314, one commutation granted (Governor J.D. Cox); 1867 Executive Documents, Part 1, Pardon Report, p. 177, one reprieve granted (Governor J.D. Cox); 1868 Executive Documents, Part 1, Pardon Report, p. 17, Commutation of Samuel Huling; Commutation of Sarah M. Victor (Governor R.B. Hayes); 1869 Executive Documents, Part 1, Pardon Report, p. 340 one commutation and three reprieves granted (Governor Rutherford B. Hayes); 1872 Executive Documents, Part 2, Governor's Report, p. 586, Commutation of Thomas Mimms (Governor Cox); 1874 Executive Documents, Part 1, Governor's Message, p. 23, Commutation of Hugh Daugherty (Governor William Allen); 1875 Executive Documents, Part 1, Governor's Message, p. 17, one commutation granted (Governor William Allen); 1878 Executive Documents, Part 2, Pardon Report, p. 568, Commutation of Thomas Mulhall (Governor Thomas L. Young).

b. The Availability of Clemency Review Unavoidably Impacts the Operation of the Earlier Stages of the Criminal Justice System and Thus is an Inextricable Part of that System

The fact that clemency is an integral part of Ohio's criminal justice system impacts every aspect of the legal proceedings that go before it. Jurors, judges, and prosecutors know that one final failsafe mechanism exists if mistakes are made, new evidence discovered, or the law is changed. The existence of the clemency process, however slightly, impacts close calls throughout the legal system.

In addition, the existence of clemency impacts the degree and expanse of judicial review. This Court has noted that "Clemency is . . . the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 411-412. And as the Sixth Circuit noted, this Court specifically relied upon the availability of clemency in denying Herrera an opportunity to obtain judicial relief on his actual innocence claim. (It is for precisely this reason that the clemency application process in Ohio is so important. It is during that process that the APA conducts the investigation and gathers the information that the governor needs in order to perform the function described in *Herrera*.)

Many circumstances that impact the fairness or reliability of a conviction or sentence can be corrected only through the clemency process. "The judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially."

United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).[20] Rules governing admissibility, waiver and procedural default, for example, prevent courts from considering facts that warrant the use of clemency. Ohio courts have rejected as grounds for judicial relief newly discovered evidence proving innocence or wrongful conviction, *Weaver v. State*, 120 Ohio St. 44, 165 N.E. 573 (1929); decriminalization of conduct for which one is imprisoned, *In re Kline*, 70 Ohio St. at 29, 70 N.E. at 512; and un-credited pre-trial detention. *State v. Summers*, 32 Ohio App. 2d 312, 316, 291 N.E.2d 489, 491 (1972). In each of these instances the courts have relied on clemency to correct the injustice. Were clemency not available, judicial review might expand to include areas now reserved for clemency consideration.

c. Clemency Review Enhances the Reliability of Convictions and Sentences

Clemency in Ohio serves as a final check on the fairness and reliability of criminal sentences. The fact that legislative regulation of the application process is permitted does not diminish the importance of clemency in Ohio's criminal justice system. The purpose of legislation regulating the

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[20] Petitioner cites *Wilson* incorrectly as authority for drawing a constitutional line between direct appeal and clemency, saying: "[State created direct appeal] turns on the courts' view of the defendant's guilt or innocence; [clemency] exists in spite of the courts' view of the defendant's guilt or innocence." [Pet. Br., p. 21] To the contrary, it is precisely because courts at times cannot consider critical facts essential to a reliable, final adjudication of a death sentence that clemency forms the final link in the total criminal justice process.

clemency application procedure is to create an orderly process for exercising the right to seek executive clemency and to insure that the governor receives accurate information. Ohio Constitutional Convention Debates (1850-51) p. 307. It is to be an aid to the Governor's exercise of the clemency power – not a hindrance. Legislative regulations are to insure the quality and reliability of information provided to the governor, *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 644 N.E.2d 369, and thus enhance the Governor's decision making ability. As is discussed below, the special death penalty regulations at issue in this case are a unique obstruction to the proper function of the clemency process.

d. Due Process Protection is Not Limited to Judicial Proceedings and Applies to Aspects of the Clemency Process

Petitioners mistakenly assume that the Fourteenth Amendment's guarantee that no state may "deprive any person of life, liberty, or property without due process of law" applies only to judicial proceedings. Noting that a direct appeal of right arises "at a very different stage in the criminal process," than does clemency review [Pet. Br. p. 19], Petitioners argue that due process protection does not apply to the right to seek clemency because, "one [appeal] is part and parcel of the judicial process; the other stands apart from the judicial process." [Pet. Br. p. 31]

Due process protections are not limited to judicial proceedings. The text of the Fourteenth Amendment guarantees that life and liberty will not be denied without

due process of law. "Due process of law" refers not only to judicial proceedings but to proceedings throughout the criminal justice system. In determining whether due process protections applied to an executive branch determination of whether a death row prisoner was sane and so could be executed, this Court noted that, "Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who had yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

Petitioners' reliance on the distinction between judicial and executive decision making does nothing to remove clemency from the textual guarantee of due process of law. Petitioners' recognition that clemency is "a different stage in the criminal process," admits the critical point in the Sixth Circuit's analysis – clemency is an integral part of Ohio's criminal justice system. As part of the "law" used to determine whether a death sentence will be carried out, it is entitled to some level of due process protection.

e. The Court Need Not Reach the Issue of Whether Counsel is Required in Clemency Proceedings in Order to Determine Whether Due Process Applies in any Manner to Ohio's Death Penalty Clemency Procedure.

Petitioners argue that "Clemency proceedings and direct appeals of right fall on different sides of a constitutional line . . . that explains why the Fourteenth Amendment grants criminal defendants a right to counsel at

trial . . . and on a direct appeal as of right but denies such a right for discretionary appeals as well as disciplinary proceedings." [Pet. Br. p. 20, citations omitted.] Petitioners confuse the issue of whether any process is due with the questions how much or what process is due. Some process is due in discretionary appeals. *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987), *quoting Ross v. Moffitt*, 417 U.S. 600, 616 (1974). Less process is due as a criminal case moves further away from the initial determination of guilt. This is in part because issues have been defined in prior proceedings and because as each level of review is passed, assuming effective assistance of counsel was provided and other rights observed, the risk of error is diminished. *Ross v. Moffitt*, 417 U.S. 600 (1974). It is not because somewhere in the criminal justice system a bright line exists beyond which no process is due. It is impossible to discern from Petitioner's reference where they believe this line lies. It cannot be between constitutionally required procedures and those that may be offered at the state's discretion. If it were there, no process would be due in direct appeals of right. It cannot be between judicial and non-judicial proceedings. If it were there, no process would be due in an executive determination of the condemned prisoner's sanity before execution can take place. The line Petitioners imagine does not exist.

Whether process is due and, if the answer is yes, to what extent, is determined by the circumstances of the situation. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Petitioners appear to argue that if the right to counsel does not attach, no process is due. That is not the case. Lesser or different kinds of process may be due and while there are

good arguments to be made for the right to counsel attaching under the circumstances of the case [*see* Brief *Amicus Curiae* of the American Bar Association], such a determination would be premature. The right to counsel may or may not attach but that does not answer the question of whether due process protections apply.

C. Mr. Woodard Has Protectable Due Process Interests Arising from Ohio Law

1. Mr. Woodard Has a State Created Liberty Interest in the Right to Seek Clemency

In addition to the due process protection that follows Mr. Woodard's life and liberty interest throughout the criminal justice system, Ohio has created an independent liberty interest in the right to seek clemency. Executive clemency review is an aspect of Ohio's criminal justice system that is intended to insure reliability in both convictions and sentences. It has been used by Ohio governors when prior stages in the system have failed to insure state-wide or intracase proportionality,[21] when newly discovered evidence exonerating or lessening the inmate's

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[21] Governor Edward F. Noyes, "Another year's experience in the matter of hearing and deciding applications for pardon has confirmed . . . that the law . . . should leave less discretion with the courts. It often happens that two prisoners work side by side in the Penitentiary, both sent there for precisely the same crime, one for one year and the other for ten." *Also see* 1873 Executive Documents, Part 2, p. 223; Governor C. William O'Neill, Commutation of Cleo Eugene Peters, Vol. 128, Ohio Senate Journal Index, p. 1472, #18 (1958); Governor Thomas Herbert, Commutation of Charles Ames, Vol. 123, Ohio Senate Journal Index, p. 1563 (1948).

culpability was found after the judgment was final and the courts could no longer consider the new information,[22] and when a general law was too harsh or simply unfair in its individual application.[23]

The Ohio Supreme Court has recognized that those convicted under Ohio laws have a right to seek clemency. *In re Kline*, 70 Ohio St. at 29, 70 N.E. at 512. Ohioans' liberty interest in clemency is not in the outcome of the process any more than an accused's liberty interest at trial is a guarantee of acquittal. Even an innocent person may be legally and constitutionally convicted and sentenced. The liberty interest is in having the clemency assessment made, for like a trial where there is no guarantee of the outcome, the clemency review and decision add one more tier of reliability to the criminal justice process to which the accused has submitted.

Ohio has established a unique capital clemency procedure and recognized the right to seek clemency. Once established, this system creates federally protected due

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[22] Governor Richard M. Bishop, pardon of Henry Rittle on recommendation of the prosecuting attorney, 1878 Executive Documents, Part 2, p. 567 (1878): "I am clearly satisfied that Rittle is not guilty of the crime as charged; of this I am satisfied from evidence obtained lately. Besides, he has served nearly ten years – a time long enough if he were actually guilty."

[23] Governor Richard F. Celeste, Ohio Senate Journal Index, Vol. 144, p. 21, (1991), Commutations of Rosalie Grant, Debra Brown, Elizabeth Green and Beatrice Lampkin, "All of these women were black, three of the four were from Hamilton County, and it was absolutely clear that the death penalty in cases involving women had not been administered fairly." Cleveland Plain Dealer, Sunday, January 5, 1997, 1997 WL 652567.

process interests in the right to meaningfully seek clemency – notwithstanding the fact that the federal constitution did not require the states to provide clemency review in the first instance. *Compare Hicks v. Oklahoma*, 447 U.S. 343 (1980) (state-created right to jury sentencing protected by due process); *Goss v. Lopez* (419 U.S. 565 (1975) (although federal constitution does not require states to establish school systems, once established, the interest in education enjoys due process protections); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process applies to parole revocation when state creates parole option); *and Evitts v. Lucey*, 469 U.S. 387 (1985) (due process requires effective assistance of appellate counsel even though federal constitution does not require states to provide appellate review of criminal convictions).

2. Discretion in the Executive Clemency Decision-Making Process Does Not Remove the Clemency Application Process from Due Process Protections

Petitioners claim that this Court's ruling in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, eliminates Mr. Woodard's liberty interest because the Ohio Governor, like the Connecticut parole board, has broad discretion to grant executive clemency. Petitioners misinterpret *Dumschat*.

Connecticut, like Ohio, recognizes "the right to seek commutation." *Dumschat*, 452 U.S. at 467. That right however was not at issue in Dumschat's case and had been given to *Dumschat* several times over. *Id.* at 461. Rather,

the Court in *Dumschat* considered only whether an explanation of the reasons for denying clemency was required. In rejecting the claim that Connecticut's clemency statute created a due process liberty interest in the sought after explanation, this Court identified the critical distinction that separates those situations that may implicate due process from those that likely do not:

> The statute [in Connecticut] imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board. . . . This contrasts dramatically with the Nebraska statutory procedures in *Greenholtz*, which expressly mandated that the Nebraska Board of Parole 'shall' order the inmate's release 'unless' it was decided that one of four specified reasons for denial was applicable. . . . A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.

Id. at 466-467.

In Ohio's two step process, the APA functions more like the board in *Greenholtz v. Nebraska*, 442 U.S. at 8, than the one in *Dumschat*. It does not have unfettered discretion in how it conducts its investigation or the standards that must be applied in making its decision. Its process, like a trial, shapes the information that goes to the final decision maker. The Ohio statutory scheme meets all the criteria for finding a due process interest recognized in *Dumschat* and *Greenholtz*: it limits the procedure to be applied, it identifies relevant evidence to be considered, and it specifies the criteria and the substantive standard that the board must follow in making its recommendation.

Under Ohio law, the APA may recommend a pardon, commutation, or reprieve "if in its judgment there is reasonable ground to believe that granting a pardon, commutation, or reprieve to the convict or paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev. Code Ann. § 2967.03. By setting forth specific decisional criteria (whether the interests of justice would be furthered, and whether it would be consistent with society's welfare and security), and by requiring that the board's decision be reasonable, the statute confines the APA's discretion within the rule of law.

3. Mr. Woodard Has a State Life Interest in Ohio's Clemency Procedures

Eugene Woodard also has a state "life" interest in having access to Ohio's clemency decision maker. This life interest must receive due process protection independently of the due process protection afforded Mr. Woodard's "original" life interest that is protected throughout Ohio's criminal justice system.

It has long been the practice in Ohio to seek clemency review in nearly every capital case. Ohio governors have recognized as part of their executive duty the obligation to review capital cases. It was the current Governor's recognition of this obligation that generated the ill-considered administrative procedure at issue in this case.

In effect the right to a capital clemency review and decision is derived from "a mutually explicit understanding," *see Leis v. Flynt*, 439 U.S. 438, 442 (1979), between the people of Ohio and their government. Just as there can be

"an unwritten common law," in the conduct of employment relations that gives rise to a protected property interest, *Perry v. Sinderman*, 408 U.S. 593, 602 (1972), so too may there be an unwritten common law in the relationship of a government with its people that gives rise to a life interest.

The right to seek clemency, at least in Ohio, has special significance and independent weight in capital cases. Ohio Governors have frequently granted clemency in capital cases.[24] In doing so, or in deciding to allow an execution to go forward, Ohio Governors fulfill their function as the final check in Ohio's system of checks and balances that insures the fair and reliable implementation of Ohio's criminal laws and particularly the death penalty. Those who face execution in Ohio depend on executive clemency review as the final determination of their fate.

The Fourteenth Amendment to the United States Constitution says that no state shall "deprive any person of life . . . without due process of law." That protection extends to a life interest recognized by State law and practice as well as directly from the structure of the

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[24] "The electric chair was first used in 1897. Since that date, a total of 502 persons have been sentenced to death, of whom 315 were actually executed and 125 commuted." Memorandum from Harold J. Cardwell, Warden of the Ohio Penitentiary, on Electrocution Statistics, to John M. McElroy, Executive Assistant, State House, Columbus, Ohio. (July 7, 1970) (on file with the Ohio Historical Society, State Archives). Ohio's death penalty law was held unconstitutional in 1978, *Lockett v. Ohio*, 438 U.S. 586 (1978). There has not been an execution in Ohio since 1963.

Fourteenth Amendment text. Ohio's executive clemency decision is the final safeguard in a system designed to be implemented by the State's legislative, judicial, and executive branches. The purpose of the Death Penalty Clemency Procedure at issue in this case is "to ensure that information about each person for whom a pardon is considered will be available to the Governor, so that an informed decision may be made." *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d at 525, 644 N.E.2d at 378.

Ohio's Death Penalty Clemency Procedure is supposed to enhance the reliability of the Governor's decision by providing him with the facts he needs to make that decision. "The function of legal process, as that concept is embodied in the Constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions . . . the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Greenholtz*, 442 U.S. at 12. The fact finding process that leads to a life or death clemency decision must be designed to avoid the risk of error and must meet at least minimal due process standards.

D. This Case Should be Remanded to Determine Whether Ohio's Death Penalty Clemency Procedure Requires Due Process Protection.

This case illustrates the need for due process protections in the administrative investigation that Ohio has made the threshold procedure and the information-gathering mechanism of its clemency process. Ohio's 1994

Death Penalty Clemency Procedure, rather than enhancing reliability or assuring that Mr. Woodard's right to seek clemency is protected, does the opposite.

Mr. Woodard received a mere three days notice that a clemency interview would be conducted in his case, and only ten days notice of the clemency hearing. J.A. p. 4. Because the hearing was to be held while Mr. Woodard was still exhausting his judicial remedies, and because he had just obtained counsel, these time constraints prohibited Mr. Woodard from participating meaningfully in the clemency hearing. He was given no opportunity to prepare his life-and-death presentation. Indeed, had the inmate interview gone forward with three days notice, Mr. Woodard would not even have had an adequate opportunity to consult with his attorney prior to that single critical interview opportunity that the APA's procedure gave him.

But for the present litigation, Mr. Woodard's interest in a clemency hearing, and the interest of the state in an informed clemency decision, would have been irreparably compromised. Petitioners ignored Mr. Woodard's request for more time to prepare for the hearing. Petitioners failed to recognize that a stay of execution had been issued and, therefore, a clemency hearing was inappropriate at that time. Indeed, Petitioners did not respond at all to Mr. Woodard's communications. J.A. p. 4-5.

Had the clemency investigation proceeded, Ohio's failure to properly protect Mr. Woodard's interests would have been further aggravated by the restraints Ohio has placed on counsel's participation in the process. Ohio

specifically prohibits the presence or assistance of counsel during the clemency interview. Death Penalty Clemency Procedure § VI(C)(2), J.A. p. 11. It also delegates a decision on counsel's attendance and participation in the clemency hearing to the sole discretion of the parole board chair. Death Penalty Clemency Procedure § VI(D)(3), J.A. p. 12. The APA procedure turns death penalty clemency into a "meaningless ritual." *Douglas v. California*, 372 U.S. 353, 385 (1963).

This serves neither the goals of Ohio's criminal justice system nor the reliance of this Court on clemency as a means of correcting injustices that are beyond judicial review. *Herrera*, 506 U.S. at 411-412. Ohio's Death Penalty Clemency Procedure unfairly and needlessly impairs the quality of the information gathered during the investigation by limiting the inmate's opportunity to participate in the process. It thus impairs the function of clemency review in Ohio's criminal justice system and infringes on Mr. Woodard's life and liberty interests.

II. OHIO'S DEATH PENALTY CLEMENCY PROCEDURE IMPOSES AN UNCONSTITUTIONAL CONDITION ON MR. WOODARD'S FIFTH AMENDMENT RIGHTS.

A. The Facts Of This Matter Are Not Fully Developed And The Sixth Circuit's Remand Order Is Appropriate.

The Sixth Circuit Court of Appeals ordered that the district court, on remand, consider the possible effect of Ohio's Death Penalty Clemency Procedure on Mr. Woodard's Fifth Amendment rights. As with the due process

issue above, the Sixth Circuit's remand was wholly appropriate. The district court erred in dismissing (on the pleadings without discovery) Mr. Woodard's claim that his Fifth Amendment rights may be implicated by the operation of the Death Penalty Clemency Procedure. Factual development is essential to ascertain whether Mr. Woodard's Fifth Amendment rights are implicated, and what if any, steps must be taken to avert their violation.

A Court ruling on these issues would "be premature at this point" as "the district court must first find the facts" that will illuminate the Fifth Amendment question. *Woodard*, at 107 F.3d at 1193. In the absence of a factual record, the Court is left to decide " . . . abstract controvers[ies] over the use of . . . words", *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15 (1945), in Ohio's Death Penalty Clemency Procedure. This endeavor is contrary to the Court's long recognition that important constitutional questions are best decided on the basis of factual records which tender the "underlying constitutional issues in clean-cut and concrete form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947). *See also Baxter v. Palmagiano*, 423 U.S. 308, 323 (1976) (without a record respecting penalty, Ninth Circuit had acted prematurely in setting standard.).

A record is particularly essential in Fifth Amendment cases "because the constitutional issue posed depends upon a judgment as to how broad a protection is necessary to serve the values, purposes, and policies underlying the Fifth Amendment." *Piccirillo v. New York*, 400 U.S. 548, 558 (1971) (Douglas, J. dissenting from the denial of certiorari). Fifth Amendment questions simply cannot be resolved without assessing the risk of incrimination.

Unconstitutional conditions cannot be assessed here without a determination of whether Mr. Woodard "must risk self-incrimination to participate in the 'optional' clemency interview, and a full determination of the "nature of Petitioner APA's Clemency Procedures." *Woodard*, 107 F.3d at 1193. The State has failed to prove that no set of facts under Ohio's Death Penalty Clemency Procedure could require that he risk self-incrimination in order to participate in the clemency recommendation process; therefore, the Sixth Circuit's decision should be affirmed.

B. Ohio's Death Penalty Clemency Procedure Imposes An Unconstitutional Condition on the Exercise of Mr. Woodard's Fifth Amendment Right to Remain Silent.

Ohio's Death Penalty Clemency Procedure imposes an unconstitutional condition on Mr. Woodard's exercise of his Fifth Amendment right against self-incrimination.[25] It forces Mr. Woodard to chose between the right to remain silent in pursuit of further legal challenges to his conviction and sentence and the right to pursue clemency.[26]

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[25] The Fifth Amendment was made applicable to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[26] Petitioners argue that because Mr. Woodard did not seek a stay until seven weeks before his execution was scheduled, he is responsible for Petitioners' efforts to subject him to Ohio's Death Penalty Clemency Procedure with its uncounseled interview and hearing in absentia. Mr. Woodard did not apply for clemency: Petitioners forced the clemency hearing upon Mr.

1. The Doctrine of Unconstitutional Conditions is Applicable Here.

"The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right. It reflects the . . . view that government may not do indirectly what it may not do directly." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). The doctrine prevents the government from denying a right or benefit on the basis of the exercise of a constitutionally protected right and forbids conditioning the granting of a benefit on the waiver of a constitutional right. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Speiser v. Randall*, 357 U.S. 513 (1958).

Petitioners essentially concede not only the applicability of this doctrine, but they recognize that, if the Death Penalty Clemency Procedure requires Mr. Woodard to sacrifice a constitutional right, the Clemency Procedure is invalid. [Pet. Br. p. 30] The procedures demand just such a sacrifice. In order to be heard in what may be his only clemency interview, Mr. Woodard would have to

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Woodard. Mr. Woodard applied for a stay of execution with the Ohio Supreme Court fifty-two days before the scheduled execution. The Supreme Court issued a stay on the forty-fifth day before the execution date. *State v. Woodard*, 70 Ohio St. 3d 1429, 638 N.E.2d 580 (1994). This is not a case where Mr. Woodard delayed seeking a stay of execution until the eleventh hour and to say that Mr. Woodard somehow invited the clemency hearing is disingenuous.

sacrifice his Fifth Amendment rights since the very purpose of the interview is to garner information about the accused, the crime and any other matter that may bear on the APA's recommendation.

Ohio granted Mr. Woodard the right and benefit of a clemency process. Article III, Section 11 of the Ohio Constitution. The State has further provided Mr. Woodard with the rights and benefits of a clemency hearing and of a clemency interview. Ohio Rev. Code Ann. § 2967.07; Death Penalty Clemency Procedure Sections VI(B)(3), (C)(1) and (2), (D), (E), J.A. at 10, 11-13. In order to be heard in the clemency process, Mr. Woodard must participate in the clemency interview. Although Petitioners are silent on this issue, *amici* for Petitioners argue that Mr. Woodard's silence will be used against him in the clemency determination. Brief of *amicus* Criminal Justice Legal Foundation at 14; Brief of *amicus* States of California *et al.* at 3, 4, 22. The decision to participate in the clemency interview cannot be voluntary when a penalty is imposed for failing to participate. *See Simmons v. United States*, 390 U.S. 377, 393-394 (1968); *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

Petitioners' argument that the "Constitution nowhere prohibits States from placing conditions on the exercise of constitutional rights" [Pet. Br. p. 26] is simply wrong, as is their reliance on *McGautha v. California*, 402 U.S. 183 (1971). *McGautha* recognized that compelling a choice may be improper if the choice "impairs to an appreciable extent any of the policies behind the right." *McGautha*, at 213. In this case, Mr. Woodard's right to remain silent about ongoing litigation over his conviction and death sentence is directly infringed. Petitioners are compelling

Mr. Woodard's statements without any guarantee that the statements will not be used against him. Therefore, the Death Penalty Clemency Procedure impairs Mr. Woodard's Fifth Amendment right to remain silent.[27]

2. The Fifth Amendment is Implicated in the Death Penalty Clemency Procedure.

The intent and goal of the Fifth Amendment is "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). *See also McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Lefkowitz v. Turley*, 414 U.S. 70. This case is more egregious than those cited above because here there is ongoing litigation over the criminal case that gives rise to the clemency interview.

The Death Penalty Clemency Procedure requires the APA to conduct an investigation to amass information for the recommendation process.[28] Death Penalty Clemency

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[27] Petitioners' reliance on *Wyman v. James*, 400 U.S. 309 (1971), is likewise misplaced. The regulation at issue in *Wyman* was not an unconstitutional condition because the requirement for home visits to continue public assistance did not implicate the Fourth Amendment. *Id.* at 317. *Wyman* turned on the facts that the visit was not an "unreasonable intrusion," the visit was not made "by police or other uniformed authority," and there was no ongoing criminal investigation. *Id.* at 321-323. These are not the facts in this case.

[28] The Parole Board is a division of Petitioner APA. Its members are state agents, see *State v. Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), who are statutorily bound to conduct this official investigation. Ohio Rev. Code Ann. §§ 2967.07 and 2967.03. These actors properly fall within the contours of the Fifth Amendment. See *Mathis v. United States*, 391 U.S. 1 (1968) (incarcerated person being interviewed by a tax agent engaged Fifth Amendment concerns), and *Fare v. Michael C.*, 442 U.S. 707, 720 (1979) ("a probation officer is the employee of the State which seeks to prosecute the alleged offender"). Further, unlike the probationer in *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984), Mr. Woodard is physically restrained and was not free to leave the prison.

Procedure VI(B); J.A. A-9-10. The Sixth Circuit naturally concluded that such an investigation could present risks of incrimination for Mr. Woodard, its subject.

The investigation employs the interview of the inmate as a mechanism to gather facts. The clemency interview is tantamount to interrogation under this Court's decision in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) because it will undoubtedly include questioning on the nature and circumstances of Mr. Woodard's case. Petitioners claim "the procedure allows Mr. Woodard to decide whether to make a statement and if so to determine how much or how little he wishes to say." [Pet. Br. p. 30] Nowhere do the procedures suggest that Mr. Woodard can refuse to answer questions put to him in the clemency interview.[29]

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[29] Indeed, Revised Code Section 2967.03 relates that the APA may investigate and examine or cause the investigation and examination of prisoners confined in state correctional institutions. Ohio Rev. Code Ann. § 5149.11 appears to authorize the APA and its hearing officers to compel testimony during such interview procedures. The Death Penalty Clemency Procedure cross-references these same statutory powers vested in this official interrogator, although not to R.C. 5149.11

The Fifth Amendment "privileges [Mr. Woodard] not to answer official questions put him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz*, 414 U.S. at 77. This privilege extends into the prison's walls. In *Baxter*, 308 U.S. at 316, the Court agreed that the protection of the privilege can extend to prison disciplinary proceedings. The privilege turns not on the type of proceeding, but "the nature of the statement or admission and the exposure which it invites." *Estelle v. Smith*, 451 U.S. 454, 462 (1982), citing *In re Gault*, 387 U.S. 1, 4 (1987).

Here, Mr. Woodard will be questioned about the crime for which he has been sentenced and concerning which there remains ongoing litigation.[30] The Sixth

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explicitly. Further, the Clemency Procedure relates that the prisoner will be asked to submit to a psychological or psychiatric evaluation, so clearly examinations are a contemplated feature of the Procedure.

[30] Ohio guarantees a right to participate in the clemency process. *In re Kline*, 70 Ohio St. 25, 70 N.E. 511. This guarantee is essential to fulfilling Petitioners' obligation to conduct a thorough investigation. Ohio Rev. Code Ann. § 2967.07. The Sixth Circuit noted that "it would seem to be in the state's own interest to encourage an open and frank [clemency] interview," *Woodard*, 107 F.3d at 1189, and that "the government cannot be said to have a legitimate purpose in limiting its 'encouragement' of clemency interviews to those inmates who relinquish their Fifth Amendment rights," *Id.* at 1191. As there is no legitimate purpose for conditioning participation in the clemency investigation on the waiver of Fifth Amendment rights, it is appropriate to apply the unconstitutional conditions doctrine.

Circuit described the problem posed by this premature, concurrent clemency proceeding as follows:

> [A] defendant who has not exhausted all post-conviction remedies still faces a risk of self-incrimination. If a defendant obtains a new trial, incriminating statements made during the appeal or post-conviction process, including those made during a clemency interview, might be admitted as evidence in that trial.

Woodard, 107 F.3d at 1192. Given that capital convictions and death sentences are overturned with some frequency in the collateral attack process,[31] this risk of incrimination from subsequent use is far from imaginary.

Further, the Death Penalty Clemency Procedure dictates that information will be collected from Mr. Woodard about his prior record and other matters. "An open-ended clemency interview could elicit incriminating statements regarding other acts unrelated to the prior conviction and could support new prosecutions for additional crimes." *Woodard*, 107 F.3d at 1192. The state could charge Mr. Woodard with any crime discovered during the interview. Thus, the risk of incrimination on this and other crimes is not trifling. *United States v. Doe*, 465 U.S.

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[31] Of the 3,834 individuals under sentence of death from 1977-1990, 1,146 had their sentences or convictions overturned. Michael D. Hintze, *"Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman"*, 24 Colum. Hum. Rts. L. Rev. 395, 410 (1993) (citing U.S. Justice Department statistics). The article finds over forty percent of all state-court capital judgments on first petition habeas corpus challenges were successful.

605, 610 (1984); *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892).

The Petitioners and their *amici* have offered no assurances that Mr. Woodard's Fifth Amendment rights will not be infringed by operation of the procedure. Petitioners argue that Mr. Woodard can exercise his Fifth Amendment right without prejudice. [Pet. Br. p. 30] *Amici* for Petitioners argue that any information gathered from the interview will be used against Mr. Woodard.[32] Indeed, the degree to which they offer different interpretations of the Death Penalty Clemency Procedure and what the State may choose to do in implementing it confirms the need for factual development and then close scrutiny of these concerns on remand.

Overall, it appears that Petitioners' position is that Mr. Woodard need not sacrifice his Fifth Amendment right as he "can always exercise [his] . . . right to silence during the initial clemency investigation. Then, assuming [he] . . . fail[s] to obtain collateral relief from the State or federal courts, [he] . . . can file a new clemency application and seek an interview at that point." [Pet. Br. p. 31] This ignores the plain language of Ohio's Death Penalty Clemency Procedure. Any subsequent clemency hearing

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[32] Both *amicus curiae* for Petitioners argue that Mr. Woodard's silence can be used to deny him clemency. Brief of *amicus* States of California *et al.* at 3, 4, 22 (the executive can consider "a claimant's declination of the opportunity to be interviewed by clemency authorities as a factor in reaching the clemency decision."); Brief of *amicus* Criminal Justice Legal Foundation at 14 ("If Ohio wishes to take into account respondent's failure to admit to his current or other crimes, it should be free to do so.").

or review will occur only at the discretion of the parole board chairperson. Death Penalty Clemency Procedure, Section VI(G), J.A. at 13-14. There is only one guaranteed clemency investigation, review, and hearing for Mr. Woodard: the one that was scheduled to occur before Mr. Woodard conducted any post-conviction investigation. Therefore, the decision to participate in the clemency interview is not a voluntary decision.

To the extent the Petitioners and their *amici* utilize *Baxter v. Palmagiano* to justify Ohio's clemency interview – the single, mandatory opportunity for an inmate to be heard in the clemency process – their reliance is misplaced. As the Sixth Circuit noted, *Baxter* is properly distinguished on several grounds: the inquiry conducted was for totally different purposes; the burden of proof was on the state; and "[t]he necessity of speaking openly to the state . . . is much greater in the clemency context [than in a prison disciplinary hearing]." *Woodard*, 107 F. 3d at 1192. Moreover, the life and death stakes of a clemency hearing clearly surpass any prison disciplinary hearing. But even if *Baxter* is somehow applicable, the Court there reaffirmed that any adverse inference drawn could not be used as a sole basis to deny the government benefit without violating the Fifth Amendment line of unconstitutional conditions cases. *Baxter*, 425 U.S. at 318.

Further, *Baxter* did not suggest that the state could compel answers inside the prison walls: if the state compelled answers over the defendant's Fifth Amendment objection, use immunity would be required. *Baxter*, 425 U.S. at 316, 318. Nor can the inmate "be required to waive such immunity" by prison officials. *Id.* Similarly, if the state sought to use silence at the disciplinary proceeding

in any future criminal proceeding, Fifth Amendment concerns would arise. *Id.* at 317. Rather than sweeping Fifth Amendment concerns aside in the context of prison inquiries, *Baxter* reaffirms that these concerns do survive within the prison walls.

Ohio's Death Penalty Clemency Procedure is at best unclear as to whether Mr. Woodard's participation in the APA's interview may be, when implemented, conditioned on a waiver of his Fifth Amendment rights. More facts are needed to fully analyze and resolve this important issue; therefore, the Sixth Circuit properly remanded the case and its order should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

1. The Eighth Amendment to the United States Constitution provides:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Article III, Section 21 of the Ohio Constitution provides:

Article III, Section 21

When required by law, appointments to state office shall be subject to the advice and consent of the Senate. All statutory provisions requiring advice and consent of the Senate to appointments to state office heretofore enacted by the General Assembly are hereby validated, ratified and confirmed as to all appointments made hereafter, but any such provision may be altered or repealed by law.

3. Section 121.02 of the Ohio Revised Code provides, in pertinent part:

The following administrative departments and their respective directors are hereby created:

(O) The department of rehabilitation and correction, which shall be administered by the director of rehabilitation and correction;

4. Section 121.03 of the Ohio Revised Code provides, in pertinent part:

The following administrative department heads shall be appointed by the governor, with the advice and consent of the senate, and shall hold their offices during the term of the appointing governor, except as provided in division (W) of this section, and are subject to removal at the pleasure of the governor.

(Q) The director of rehabilitation and correction;

5. Section 2967.03 of the Ohio Revised Code provides, in pertinent part:

The adult parole authority may exercise its functions and duties in relation to the pardon, commutation of sentence, or reprieve of a convict upon direction of the governor or upon its own initiative. It may exercise its functions and duties in relation to the parole of a prisoner who is eligible for parole upon the initiative of the head of the institution in which the prisoner is confined or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which the prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state correctional institutions concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.

The authority may recommend to the governor the pardon, commutation of sentence, or reprieve of any convict or prisoner or grant a parole to any prisoner for

whom parole is authorized, if in its judgment there is reasonable ground to believe that granting a pardon, commutation, or reprieve to the convict or paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society. However, the authority shall not recommend a pardon or commutation of sentence of, or grant a parole to, any convict or prisoner until the authority has complied with the applicable notice requirements of sections 2930.16 and 2967.12 of the Revised Code and until it has considered any statement made by a victim or a victim's representative that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to section 2930.17 of the Revised Code and any other statement made by a victim or a victim's representative that is relevant to the convict's or prisoner's case and that was received by the authority after it provided notice of the pendency of the action under sections 2930.16 and 2967.12 of the Revised Code. If a victim or victim's representative appears at a full board hearing of the parole board and gives testimony as authorized by section 5149.101 of the Revised Code, the authority shall consider the testimony in determining whether to grant a parole. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish to the authority, at the request of the authority, a summarized statement of the facts proved at the trial and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for the recommendation. The trial judge of the court, and the prosecuting attorney in the

trial, in which a prisoner was convicted may appear at a full board hearing of the parole board and give testimony in regard to the grant of a parole to the prisoner as authorized by section 5149.101 of the Revised Code. All state and local officials shall furnish information to the authority, when so requested by it in the performance of its duties.

6. SECTION 2967.12 OF THE OHIO REVISED CODE PROVIDES, IN PERTINENT PART:

(A) Except as provided in division (G) of this section, at least three weeks before the adult parole authority recommends any pardon or commutation of sentence, or grants any parole, the authority shall send a notice of the pendency of the pardon, commutation, or parole, setting forth the name of the person on whose behalf it is made, the offense of which the person was convicted, the time of conviction, and the term of the person's sentence, to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the person was found. If there is more than one judge of that court of common pleas, the authority shall send the notice to the presiding judge.

(B) If a request for notification has been made pursuant to section 2930.16 of the Revised Code, the adult parole authority also shall give notice to the victim or the victim's representative prior to recommending any pardon or commutation of sentence for, or granting any parole to, the person. The authority shall provide the notice at the same time as the notice required by division (A) of this section and shall include in the notice the information required to be set forth in that notice. The

notice also shall inform the victim or the victim's representative that the victim or representative may send a written statement relative to the victimization and the pending action to the adult parole authority and that, if the authority receives any written statement prior to recommending a pardon or commutation or granting a parole for a person, the authority will consider the statement before it recommends a pardon or commutation or grants a parole. If the person is being considered for parole, the notice shall inform the victim or the victim's representative that a full board hearing of the parole board may be held and that the victim or victim's representative may contact the office of victims' services for further information.

(C) When notice of the pendency of any pardon, commutation of sentence, or parole has been given as provided in division (A) of this section and a hearing on the pardon, commutation, or parole is continued to a date certain, the authority shall give notice by mail of the further consideration of the pardon, commutation, or parole to the proper judge and prosecuting attorney at least ten days before the further consideration. When notice of the pendency of any pardon, commutation, or parole has been given as provided in division (B) of this section and the hearing on it is continued to a date certain, the authority shall give notice of the further consideration to the victim or the victim's representative in accordance with section 2930.03 of the Revised Code.

(D) In case of an application for the pardon or commutation of sentence of a person sentenced to capital punishment, the governor may modify the requirements of notification and publication if there is not sufficient

time for compliance with the requirements before the date fixed for the execution of sentence.

(F) The failure of the adult parole authority to comply with the notice provisions of division (A), (B), or (C) of this section or the failure of the parole board to comply with the notice provisions of division (E) of this section do not give any rights or any grounds for appeal or post-conviction relief to the person serving the sentence.

7. Section 5120.01 of the Ohio Revised Code provides, in pertinent part:

The director of rehabilitation and correction is the executive head of the department of rehabilitation and correction. All duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under such rules and regulations as he prescribes, and shall be under his control. The director shall have power to control transfers of inmates between the several state institutions included under section 5120.05 of the Revised Code.

8. Section 5149.11 of the Ohio Revised Code provides, in pertinent part:

In the exercise of any of the powers vested in the adult parole authority, the chief of the authority, any member of the board, or any hearing officer may administer oaths and in the name of the authority may issue subpoenas and subpoenas duces tecum. The authority may compel the attendance of witnesses and the production of records and papers of all kinds and description including any and all books, accounts, documents, memorandums, and transcripts of testimony, pertaining to any

inquiry within the powers and duties of the authority. Upon the failure of any person to comply with any order of the authority or any subpoena or subpoena duces tecum lawfully issued, or upon the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, a judge of the court of common pleas of any county in this state, on the application of the authority, shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from a court of common pleas or a refusal to testify therein.

9. Section 5120:1-1-15 of the Ohio Administrative Code provides, in pertinent part:

(A) All applications for pardon, reprieve or commutation of sentence shall be made in writing to the Chief of the Adult Parole Authority.

(B) When an application for a pardon, reprieve or commutation of sentence is filed with the Chief of the Adult Parole Authority, the authority shall conduct such investigation as is necessary and make a recommendation to the governor. A hearing may be held at the discretion of the Parole Board. Such hearing if held, shall be before at least a majority of the members of the Parole Board.

(C) At least three weeks prior to any hearing held to consider pardon, reprieve or commutation of sentence, notice of such hearing shall be sent to the prosecuting attorney and the judge of the Court of Common Pleas of the county in which the indictment against the applicant was found, and, if required by section 2967.12 of the Revised Code, to the victim or victim's family. Where

there is more than one judge of the court of common pleas, the notice shall be sent to the presiding judge.

(D) Such notice shall contain the following:

(1) The name of the applicant;

(2) The crime for which the applicant was convicted;

(3) The date of conviction;

(4) The term of sentence.

(E) In the event the hearing is continued, notice of such continuance and the date of the continued hearing shall be sent to all interested parties at least ten (10) days prior to the date of the continued hearing.

(F) In the event the decision of the Parole Board is to recommend for or against pardon, reprieve, or commutation of sentence, such recommendation shall be forwarded to the Governor, together with a brief statement of the facts, the grounds for such recommendation, and the record or minutes of the case.

(G) The decision of the Parole Board to recommend for or against pardon, reprieve or commutation of sentence shall be within its sole discretion and shall not be subject to administrative review.

(H) If the adult parole authority receives an application for pardon, commutation or reprieve for a person for whom executive clemency was denied less than two years earlier than the date the subsequent application was received, and the authority does not believe that the application contains any grounds that were not or could

not have been presented in the earlier application, the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial. In such a case, no hearing and no further investigation shall be necessary unless specifically requested by the governor.

(I) The adult parole authority shall consider a case for pardon or commutation only upon the application of the convicted person or his counsel or at the direction of the governor.

STATE DEATH PENALTY CLEMENCY PROCEDURES

Table 1

STATES THAT HAVE GIVEN THE CLEMENCY POWER EXCLUSIVELY TO A BOARD. (SIX STATES)

Connecticut	Const., Art. IV, Sec. 13, Conn. Gen. Stat. Sec. 321-18-26 (1992)
Georgia	Const., Art. IV, Sec. 2, p 2, Ga.Code Ann. Secs. 42-9-20, 42-9-42 (1994 and Supp. 1995)
Idaho	Const., Art. IV, Sec. 7, Idaho Code Secs. 20-240 (Supp.1995), 67-804 (1989)
Nebraska	Const., Art. IV, Sec. 13, Neb. Rev. Stat. Secs. 83-1, 127 to 83-1, 132 (1994)
Nevada	Const., Art. V, Sec. 13, Nev. Rev. Stat. Sec. 213.080 (1991)
Utah	Const., Art. VII, Sec. 12, Utah Code Ann. Sec. 77-27-5.5 (1995)

Table 2

STATES THAT USE A COMBINATION OF A BOARD AND EXECUTIVE DECISION. (EIGHTEEN STATES)

Arizona	Const., Art. V, Sec. 5, Ariz. Rev. Stat. Ann. Secs. 31-443, 31-445 (1986 and Supp.1995)
Arkansas	Const., Art. VI, Sec. 18, Ark. Code Ann. Secs. 5-4-607, 16-93-204 (1987 and Supp.1993)
Delaware	Const., Art. VII, Sec. 1, Del. Code Ann., Tit. 29, Sec. 2103 (1991)
Florida	Const., Art. IV, Sec. 8, Fla. Stat. Sec. 940.01 (Supp.1991)

Illinois	Const., Art. V, Sec. 12, Ill. Rev. Stat., ch. 38, p 1003-3-13 (1992)
Indiana	Const., Art. V, Sec. 17, Ind. Code Secs. 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1992)
Kansas	Const., Art. I, Sec. 7, Ann. Code Sec. 22-3701 (1988)
Louisiana	Const., Art. IV, Sec. 5(E), La. Rev. Stat. Ann. Sec. 15:572 (West 1992)
Maryland	Const., Art. II, Sec. 20, Md. Ann. Code, Art. 27, Sec. 77 (1992), and Art. 41, Sec. 4-513 (1990)
Mississippi	Const., Art. V, Sec. 124, Miss. Code Ann. Sec. 47-5-115 (1981)
Montana	Const., Art. VI, Sec. 12, Mont. Code Ann. Secs. 46-23-301 to 46-23-316 (1991)
New Hampshire	Const., pt. 2, Art. 52, N.H. Rev. Stat. Ann. Sec. 4:23 (1988)
Ohio	Const., Art. III, Sec. 11, Ohio Rev. Code Ann. Secs. 2967.02 to 2967.12 (1987 and Supp.1991)
Oklahoma	Const., Art. VI, Sec. 10, Okla. Stat., Tit. 21, Sec. 701.11a (1990)
Pennsylvania	Const., Art. IV, Sec. 9, (Purdon 1994)
South Dakota	Const., Art. IV, Sec. 3, S.D. Codified Laws Secs. 23A-27A-20 to 23A-27A-21, 24-14-1 (1988)
Tennessee	Const., Art. III, Sec. 6, Tenn. Code Ann. Secs. 40-27-101 to 40-27-109 (1995)
Texas	Const., Art. IV, Sec. 11, Tex. Code Crim. Proc. Ann. Sec. 48.01 (Vernon 1979 and Supp. 1995)

Table 3

STATES WHERE THE GOVERNOR MUST HAVE A FAVORABLE RECOMMENDATION IN ORDER TO GRANT CLEMENCY. (NINE STATES)

Arizona	Const., Art. V, Sec. 5, Ariz. Rev. Stat. Ann. Secs. 31-402 (1986 and Supp. 1995)
Delaware	Const., Art. VII, Sec. 1 (1991)
Florida	Const., Art. IV, Sec. 8, Fla. Stat. Sec. 940.01 (1996)
Indiana	Const., Art. V, Sec. 17, Ind. Code Secs. 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1996)
Louisiana	Const., Art. IV, Sec. 5(E), La. Rev. Stat. Ann. Sec. 15:572 (1997)
Montana	Const., Art. VI, Sec. 12, Mont. Code Ann. Secs. 46-23-301 to 46-23-316 (1991)
Oklahoma	Const., Art. VI, Sec. 10, Okla. Stat. Title 57, Sec. 332.2 (1996)
Pennsylvania	Const., Art. IV, Sec. 9, 37 Pa. Code § 81.101 (Purdon 1994)
Texas	Const., Art. IV, Sec. 11, Tex. Code Crim. Proc. Ann. Sec. 48.01 (Vernon 1979 and Supp. 1995)

Table 4

STATES THAT REQUIRE THE GOVERNOR TO RECEIVE A NON-BINDING RECOMMENDATION FROM THE BOARD BEFORE MAKING A CLEMENCY DECISION. (NINE STATES)

Arkansas	Const., Art. VI, Sec. 18, Ark. Code Ann. Secs. 5-4-607, 16-93-204 (1987 and Supp. 1993)

Illinois	Const., V, Sec. 12, Ill. Rev. Stat., ch. 38, p 1003-3-13 (1992)
Kansas	Const., Art. I, Sec. 7, Kan. Ann. Code Sec. 22-3701 (1988)
Maryland	Const., Art. II, Sec. 20, Md. Ann. Code Art. 27, Sec. 77 (1992), Art. 41, Sec. 4-513 (1990)
Mississippi	Const., Art. V, Sec. 124, Miss. Code Ann. Sec. 47-5-115 (1981)
New Hampshire	Const., pt. 2, Art. 52, N.H. Rev. Stat. Ann. Sec. 4:23 (1988)
Ohio	Const., Art. III, Sec. 11, Ohio Rev. Code Ann. Secs. 2967.02 to 2967.12 (1987 and Supp. 1994)
South Dakota	Const., Art. IV, Sec. 3, S.D. Codified Laws Sec. 23A-27A-20 to 23A-27A-21, 24-14-1 (1988)
Tennessee	Const., Art. III, Sec. 6, Tenn. Code Ann. Secs. 40-27-101 to 40-27-109 (1995)

Table 5

STATES WHERE THE GOVERNOR HAS THE SOLE RESPONSIBILITY FOR CONSIDERING CLEMENCY APPLICATIONS, ALTHOUGH THE GOVERNOR MAY DIRECT A BOARD TO INVESTIGATE THE APPLICATION. (FOURTEEN STATES)

Alabama	Const., Amend. 38, Ala. Code Sec. 15-22-27 (1982)
California	Const., Art. V, Sec. 8, Cal. Govt. Code Ann. Sec. 12030(a) (West 1995)
Colorado	Const., Art. IV, Sec. 7, Colo. Rev. Stat. Secs. 16-17-101, 16-17-102 (1989)

Kentucky	Const., Sec. 77 (1988)
Missouri	Const., Art. IV, Sec. 7, Mo. Rev. Stat. Secs. 217.220 (Vernon 1995), 552.070 (Vernon 1987)
New Jersey	Const., Art. V, Sec. 2, p 1, N.J. Stat. Ann. Secs. 2A:167-4, 2A:167-12 (West 1985)
New Mexico	Const., Art. V, Sec. 6, N.M. Stat. Ann. Sec. 31-21-17 (1992)
New York	Const., Art. IV Sec. 4 (1987)
North Carolina	Const., Art. III, Sec. 5(6), N.C. Gen. Stat. Secs. 147-23 to 147-25 (1987)
Oregon	Const., Art. V, Sec. 14, Ore. Rev. Stat. Secs. 144.640 to 144.670 (1991 and Supp. 1995)
South Carolina	Const., Art. IV, Sec. 14, S.C. Code Ann. Secs. 24-21-910 to 24-21-1000 (1977 and Supp.1991)
Virginia	Const., Art. V, Sec. 12, Va. Code Ann. Sec. 53.1-230 (1995)
Washington	Const., Art. III, Sec. 9, Wash. Rev. Code Sec. 10.01.120 (1992)
Wyoming	Const., Art. IV, Sec. 5, Wyo. Stat. Sec. 7-13-801 (1990)

Table 6

STATES WHERE THE GOVERNOR SITS ON THE CLEMENCY BOARD. (THREE STATES)

Florida	Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996)
Nebraska	Art. 4 § 13, Neb. Rev. Stat. § 83-1 (1996)

Nevada	Const. Art. 4 § 14, Nev. Rev. Stat. 213.005 to 213.100 (1997)

Table 7

STATES THAT ALLOW A HEARING OF SOME SORT TO REVIEW THE EVIDENCE OF THE INMATE. (THIRTY-FIVE STATES)

Alabama	Ala. Code Sec. 15-22-23(a)(1); 15-22-25 (1982)
Arizona	Ariz. Admin. Code R5-4-601 - 603
Arkansas	Ark. Code Ann. § 16-93-204 (1987 and Supp.1993); Board Rules 4, 6
California	Cal. Code Ann. § 6-4812; Cal. Code Regs. tit. 15, § 2247 (West 1995)
Colorado	Dept. of Corr. R. 203-2 (IV)(C)(E)
Connecticut	Conn. Gen. Stat. Sec. 321-18-24 et seq. (1992)
Delaware	Board of Pardons Rule 1
Florida	Rules of Executive Clemency R. 15
Georgia	78 Op. Att'y Gen. 44 (1978); Ga. Admin. Code § 475-3.10(2)(b)
Idaho	Idaho Admin. Code § 50.01.01-250.04, 450.08
Illinois	730 Ill. Comp. Stat., 5/3-3-13(c); Bd. Guideline R. (B)(2)
Indiana	Ind. Code Secs. 11-9-2-2 to 11-9-2-3 (1992)
Kansas	Kan. Admin. Code § 45-14-1
Louisiana	Clemency R. 3; La. Rev. Stat. Ann. § 15:573 (West 1992)

Maryland	Md. Admin. Code §§ 12.08.01.06 to .12
Mississippi	Miss. Code Ann. Sec. 47-7-17; 47-7-31 (1981)
Montana	Mont. Code Ann. § 46-23-301 (1991)
Nebraska	Neb. Rev. Stat. § 83-1, 127 to 83-1, 132 (1994); see also *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993)
Nevada	Nev. Admin. Code § 213.190
New Hampshire	N.H. Rev. Stat. Ann. § 4:21 (1988)
New Mexico	N.M. Stat. Ann. § 31-21-17; 31-21-24 (1992); Executive Guide IV(3)
New York	N.Y. Exec. Law § 2-A (notes)
North Carolina	Telephone interview by Robert K. Lowe with Executive Clemency Board Oct. 12, 1995
Ohio	Death Penalty Clemency Procedure VI(C), (D)
Oklahoma	Okla. Stat., 57-7-332.2 (1990)
Oregon	Ore. Rev. Stat. § 144. 054, 144.650 (1991 and Supp. 1995)
Pennsylvania	37 Pa. Code § 81-211
South Carolina	S.C. Code Ann. § 24-21-910 to 24-21-1000 (1996)
South Dakota	S.D. Codified Laws § 24-14-4; 24-13-1; S.D. Admin R. 17:60:05:01
Tennessee	Tenn. Code Ann. § 40-28-103 et seq. (1995)

Texas	37 Tex. Admin. Code § 147.1 (West 1995)
Utah	Utah Code Ann. § 77-27-5.5 (1995)
Virginia	Parole Bd. Policy VI(B)
Washington	Bylaw of the Board of Clemency and Pardons 3.010
Wyoming	Board of Parole R. II; III

Table 8

STATES THAT PROVIDE FOR PUBLIC HEARINGS TO REVIEW CLEMENCY APPLICATIONS. (SIXTEEN STATES)

Alabama	Code Sec. 15-22-23
Arkansas	Code Sec. 16-93-703
Delaware	Const., VII, Sec. 1, Bd. Rule 5
Georgia	Information Guide of the State Board of Pardons and Parole
Idaho	IDAPA 50.01.01-250 and 450
Illinois	Guidelines for Executive Clemency Hearings (C)
Indiana	220 IAC 1.1-2.2
Louisiana	La. Rev. Stat. Ann. § 15:573 (West 1992)
Montana	Mont. Code Ann. Sec. 46-23-302
Nebraska	*Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993)
Pennsylvania	37 Pa. Code Sec. 81.63
South Dakota	Codified Laws Sec. 24-14-16
Tennessee	Code Ann. Sec. 40-28-105 (all votes must be in public)

Texas	37 Tex. Admin. Code §§ 145 and 147 West 1995, Board of Pardon and Parole Rule 147.1
Utah	R671-312-3 and R671-315-1
Washington	Board Bylaw 3.010

Table 9

STATES THAT MAY ALLOW WITNESSES FOR BOTH SIDES TO PRESENT WRITTEN OR ORAL STATEMENTS DURING THE CLEMENCY PROCESS. (THIRTY-FOUR STATES)

Alabama	Code Sec. 15-22-23
Arizona	Admin. Code R5-4-601 to 603
Arkansas	Memorandum from Deborah Sallings Arkansas Capital Resource Center, to Michael Benza (Feb. 15, 1995) (on file with the Office of the Ohio Public Defender)
California	15 CAC 2245 et seq., and Code 6-4812
Colorado	DOC 203-2 IV(C)
Connecticut	321-18-24a-30 and past practice
Delaware	Board of Pardon rule 6
Florida	Board rule 15
Georgia	Information guide of the Board of Pardons and Paroles
Idaho	IDAPA 50.01.01:250 and 450
Illinois	Guidelines for Executive Clemency
Indiana	Code 11-9-2-2
Louisiana	La. Rev. Stat. Ann. § 15:572.4(B)(2) (West 1997)

Maryland	Code 12.08.01.15 to .18
Mississippi	Telephone interview by Robert K. Lowe, paralegal with Mississippi Public Defender office (Nov. 7, 1995)
Missouri	Missouri Capital Case Resource Manual and Code 552.070
Montana	Code Ann. Sec. 46-23-302
Nebraska	*Otey v. Hopkins*, 5 F.3d 1125 (C.A.8 (Neb.) 1993)
Nevada	213.010
New Hampshire	4:28
New Jersey	Executive Clemency provision XXIV
New York	Art. 2-A Exec. Law - notes
Ohio	Clemency procedure(at Board's discretion)
Oklahoma	Memorandum from Randy Bauman, Oklahoma Indigent Defense System, to Michael Benza (Feb. 18, 1995) (on file with the Office of the Ohio Public Defender)
Oregon	Code Sec. 255-37-005
Pennsylvania	37 Pa. Code Sec. 81.93
South Carolina	Code Ann. Sec. 24-21-50
South Dakota	Codified Laws 24-11-6
Tennessee	Code Ann. 40-28-106
Texas	Board rule 147.5
Utah	Admin. R671-312-2
Virginia	Walter A. McFarlane, The Clemency Process in Virginia, 27 U. Rich. L. Rev. 241 (1993)

Washington	Board Bylaw 3.080
Wyoming	W.S. 7-13-402

Table 10

STATES THAT PERMIT COUNSEL, IF RETAINED, TO BE INVOLVED IN THE CLEMENCY PROCESS. (THIRTY-TWO STATES)

Alabama	Al. Code Sec. 15-22-23;
Arizona	Az. Admin. Code R5-4-601 to 603
Arkansas	Executive Clemency R. 2; Memorandum From Deborah Sallings, Arkansas Capital Resource Center, to Michael Benza (Feb. 15, 1995) (on file with the Office of the Ohio Public Defender)
California	15 CAC 2251 and 2256 and Code 6-4852.08
Connecticut	Conn. 321-18-24a-30 and past practice
Delaware	Board of Pardon rule 6
Florida	Board rule 15
Georgia	Information guide of the Board of Pardons and Paroles
Idaho	IDAPA 50.01.01:250 and 450
Illinois	Guidelines for Executive Clemency and Code 5/3-3-13
Indiana	In. Code 11-9-2-2
Louisiana	La. Rev. Stat. Ann. § 15:572.7 (West 1997)
Maryland	Md. Code 12.08.01.15 to .18

Mississippi	Miss. Code 47-7-31
Missouri	Missouri Capital Case Resource Materials
Montana	Mont. Code Ann. Sec. 46-23-302
Nebraska	*Otey v. Hopkins*, 5 F.3d 1125 (C.A.8 (Neb.) 1993)
Nevada	Telephone interview by Robert K. Lowe with Nevada Public Defender office (Sept. 21, 1995)
New Jersey	Executive Clemency provision XXIV
New York	N.Y. Exec. Law § 2-A (notes)
North Carolina	Telephone interview with Executive Clemency Board (Oct. 12, 1995)
Oklahoma	Memorandum from Randy Bauman, Oklahoma Indigent Defense System, to Michael Benza (Feb. 18, 1995) (on file with the Office of the Ohio Public Defender)
Oregon	Ore. Code Sec. 255-37-005
Pennsylvania	37 Pa. Code Sec. 81.82
South Carolina	S.C. Code Ann. Sec. 24-21-50
South Dakota	S.D. Codified Laws 24-11-6
Tennessee	Tenn. Code Ann. § 40-28-106
Texas	Board rule 147.5
Utah	Utah Admin. R671-312-2
Virginia	Walter A. McFarlane, The Clemency Process in Virginia, 27 U. Rich. L. Rev. 241 (1993)

Washington	Board Bylaw 3.080
Wyoming	W.S. 7-13-402

Table 11

STATES THAT PROVIDE APPOINTED COUNSEL FOR CLEMENCY REVIEW. (THREE STATES)

California	15 CAC 2251
Florida	Fla. State. Ann. § 27.51
Tennessee	Tenn. Code Ann. § 40-28-106(b)(4)